IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-898

LINDA MARIE SUTHERLAND; ROXANA MARGUERITE SCHULTZ; and TONIA SUE PAPKE,

Appellants,

-against-

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION OF THE APPELLEE TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT BELOW WITH SUPPORTING MEMORANDUM OF LAW

WILLIAM J. SCOTT,
Attorney General for the State of Illinois

JAMES B. ZAGEL,
JAYNE A. CARR,
Assistant Attorneys General

188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Appellee.

Of Counsel.

TIMOTHY B. NEWITT,
Assistant Attorney General

DAVID DE DONCKER,
State's Attorney of Rock Island County
Rock Island County
Rock Island, Illinois 61201
(309) 786-4451

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Pursuant to Rule 16 of the Rules of this Court and the request of the court as contained in the letter of its clerk, Michael Rodak, dated February 5, 1976, Appellee, PEOPLE OF THE STATE OF ILLINOIS, by its attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, respectfully moves this court to dismiss the above-captioned Appeal or, in the alternative, to affirm the judgment of the Illinois Appellate Court, Third District, and submit the following memorandum of law in support of the motion.

QUESTIONS PRESENTED

1. Whether this Appeal presents a substantial federal question under Rule 16 of the Rules of this court.

2. Whether the convictions of Appellants for publicly burning the United States Flag violated their rights under the First Amendment to the United States Constitution.

3. Whether the statute under which the Appellants were convicted was vague or overbroad and, for that reason, rendered their convictions void under the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I.

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND, HENCE, IT MUST BE DISMISSED UNDER RULE 16.

When this case was last before the court, the judgment of the Illinois Appellate Court affirming Appellants' convictions was vacated and the case was remanded for consideration in the light of the two recently decided cases of *Smith* v. *Goguen*, 415 U.S. 566 (1974) and *Spence* v. *Washington*, 418 U.S. 405 (1974). *Sutherland* v. *Illinois*, 418 U.S. 907 (1974). The Illinois Appellate Court again affirmed the convictions, *People* v. *Sutherland*, 329 N.E. 2d 820 (1975).[1] If there were any ground for reversal of the judgment in the present case elsewhere than in *Smith* and *Spence*, this court could have, and presumably would have considered it. Hence, the only reason remaining for reversal of the judgment is if the Illinois Appellate Court incorrectly distinguished *Smith* and *Spence*. Since that court was correct in finding that those cases did not require reversal of the present convictions, there remains no ground for reversal and the Appeal must be dismissed because it does not present a substantial Federal question, Rule 16(b) of the Rules of The United States Supreme Court.

The present Appellants were convicted in the Circuit Court of Rock Island County, Illinois of publicly mutilating the flag by burning it on the lawn of the Post Office in

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1. A complete procedural history of the case is to be found at Page 2 of Appellants' Jurisdictional Statement.

Rock Island. The indictment reads, in relevant part, as follows:

> . . . LINDA MARIE SUTHERLAND aka LINDA MARIE WILLAREDT, ROXANA MARGURITE SCHULTZ and TONIA SUE PAPKE . . . committed the offense of PUBLICLY MUTLIATING A FLAG OF THE UNITED STATES, in that they did then and there knowingly and publicly mutilate a flag of the United States by burning said flag in a public place, to-wit: before the Rock Island Post Office, Rock Island, Illinois. . . . Common Law Record, page 9.

The proof showed that after they had set the flag on fire, a passing motorist stopped his car, double-parked, ran over to the burning flag, and stamped out the flames. The Appellants burned the flag in order to protest the Viet Nam War and the Kent State killings.

In *Smith* v. *Goguen*, cited above, Goguen was convicted of flag desecration for wearing a flag sewn to the seat of his pants. The specific language used in the charge and the statute was "treats contemptuously." This court found that those words were unconstitutionally vague and reversed Goguen's conviction. Mr. Justice White concurred in the judgment, disagreeing with the court on the vagueness ground but holding that Goguen's conduct was communication protected by the First Amendment. The Chief Justice and Justices Blackmun and Rehnquist dissented.

The present case is clearly distinguishable from *Smith*. First, although it also involves a charge of flag desecration (as opposed to improper use, the charge in *Spence*), the language in the present case is quite specific. The Appellants were charged with publicly mutilating a flag by burning it. (The words of the indictment are quoted above). There can be no question that this language provides proper notice as to the action proscribed. Furthermore,

contrary to Appellants' claim, it does not allow discriminatory enforcement (see the argument in Section III C below). In the majority opinion in *Smith*, Mr. Justice Powell was careful to distinguish the "treats contemptuously" language from the more specific language of the Federal flag desecration statute which prohibits only physical acts of mutilation, 415 U.S. at 581-582 and note 30 at page 582. Since a physical act of mutilation is what Appellants in the present case were convicted of, their conviction cannot be void on the vagueness ground set forth in *Smith*.

In *Spence* v. *Washington*, cited above, Spence was convicted of improper use (not desecration as in the *Smith* case and the present case) of the flag in that he hung it in his window with a peace symbol taped on it. This court reversed the conviction of Spence on the ground that Spence's conduct was communication protected by the First Amendment. The court did not reach the vagueness and overbreadth claims. The court identified four important factors in the case: First, the flag was private property. Second, it was displayed on private property. Third, there was no risk of breach of the peace. Fourth, Spence was engaged in a form of communication, 94 S. Ct. at 2729-2730. The court then concluded that this case involved communication by conduct and that the analysis set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), applied. If the state had a sufficient interest unrelated to speech in punishing the conduct involved, then the conviction must stand as did O'Brien's. The court mentioned three interests: protecting against breach of the peace, protecting the sensibilities of passersby, and preserving the flag unsullied as a symbol of our national heritage. None were found to be present in *Spence*.

The present case is unlike *Spence* in a number of important respects. The second and third important factors mentioned above are not present in this case. The flag here was burned on public property and there was evidence of likelihood of breach of the peace. Also, at least two government interests which can justify proscription of speech-related conduct in this connection are present in this case, namely, protecting against a breach of the peace and preservation of the flag as our national symbol. See Section II of this memorandum below.

Furthermore, it is clear that as far as First Amendment protection goes, flag burning is in a class by itself and is not covered by the *Spence* holding. No less an advocate of free speech than the late Justice Black stated in his dissenting opinion in *Street* v. *New York,* 394 U.S. 576, 609 (1969), that he believed that the state and federal governments did have the power to prevent flag desecration. At page 610 he stated the following:

> It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense.

The other three dissenters (Justices Warren, White and Fortas) agreed. It is to be noted that the majority in *Street* did not reach the issue of whether flag burning could be proscribed, but reversed only because they thought Street might have been convicted for his words alone. The concurring opinion of Mr. Justice White in *Smith,* cited above, 415 U.S. at 587-588, and the dissenting opinions in both *Smith* and *Spence* are in accord with this view as are *United States* v. *Crosson,* 462 F. 2d 96 (9th Cir. 1972), cert. den. 409 U.S. 1064; *Joyce* v. *United States,* 454 F. 2d 971 (D.C. Cir. 1971),cert. den. 405 U.S. 969 (1972); *Sutherland* v. *DeWulf,* 323 F. Supp. 740 (S.D. Ill. 1971)

present case; and *Deeds* v. *Beto,* 353 F. Supp. 840 (N.D. Tex. 1973).

Finally, the court in *Spence* also specifically exempted the facts of the present case from its holding by stating the following:

> Appellant was not charged under the desecration statute, see n. 1 *supra,* nor did he permanently disfigure the flag or destroy it. 94 S. Ct. at 2732.

Appellants here were charged under a desecration statute and they did destroy the flag.

For these reasons, the Illinois Appellate Court was correct in holding that *Smith* and *Spence* do not require reversal of the present convictions and this appeal should be dismissed because no substantial federal question remains for this court's consideration.

II.

APPELLANTS' CONVICTION FOR FLAG BURNING DOES NOT VIOLATE THEIR RIGHT TO FREE SPEECH UNDER THE FIRST AMENDMENT.

If the court finds, contrary to the argument presented above, that there remains a substantial federal question which should be considered on appeal, Appellees request, in the alternative, that the court affirm the judgment of the Illinois Appellate Court without further briefing or argument. It should be noted in this connection that when the case was last before the court, four Justices were of the opinion that this was the correct disposition of the case. *Sutherland* v. *Illinois,* 418 U.S. 907 (1974).

Appellants' first contention is that their action in publicly burning the flag as a means of protesting the Viet

Nam War and the Kent State killings was protected by the First Amendment. This is not the case.

As indicated above, the four dissenters in *Street* v. *New York* who, unlike the majority, reached the issue of whether a state may prohibit public flag burning as a means of protest, all agreed that a state has that power and would have affirmed Street's conviction. In *Spence* v. *Washington,* cited above, and *Smith* v. *Goguen,* cited above, the Chief Justice and Justices White, Blacknun and Rehnquist agreed. The majority of the court in *Spence* specifically excepted permanent disfigurement or destruction from its First Amendment holding, 94 S. Ct. at 2732.

The Illinois Appellate Court correctly held that the controlling case in this situation was *United States* v. *O'Brien,* 391 U.S. 367 (1968), and Appellants concede at pages 13 and 14 of their Jurisdictional Statement that this is so.

O'Brien was convicted for burning his draft card to protest the Viet Nam War and the draft. Appellants in this case were convicted of burning the flag for similar reasons. In *O'Brien,* Chief Justice Warren made the following statement:

> We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. 391 U.S. at 376.

The court held in *O'Brien* that where speech and non-speech elements are both present, the non-speech element can be regulated even though it may have an incidental limiting effect on the speech element if the regulation:

> is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. 391 U.S. at 376.

As the Appellate Court held, the O'Brien test is met here.

The most important factor in applying this test is identifying the interest of the government in regulating speech-related conduct. The Appellate Court emphasized the breach of the peace rationale mentioned above in Section I, but the government has an additional and equally important interest in regulating flag desecration. This interest is the preservation of the flag's integrity as our national symbol. See, e.g., dissenting opinions of Justice Fortas, *Street* v. *New York,* 394 U.S. 576, 616-617 (1969); Justices White and Rehnquist, *Smith* v. *Goguen,* 415 U.S. 566, 586-587, 600-604 (1974); concurring opinion of Justice Ryan in *People* v. *Lindsay,* 51 Ill. 2d 399, 282 N.E. 2d 431, 435 (1972); *United States* v. *Crosson,* 462 F. 2d 96 (9th Cir. 1972); and *Joyce* v. *United States,* 454 F. 2d 971 (D.C. Cir. 1971).

Either one of these interests alone is sufficient to sustain the constitutionality of the regulation of flag burning and the combination of the two strengthens the case for constitutionality immeasurably. It is clear that both of these interests are substantial and that they are within the police power of the state legislature. Furthermore, government regulation of flag burning in order to guard against a breach of the peace is clearly unrelated to speech. Government regulation of flag burning in order to preserve the flag as a national symbol may have some relation to ideas, but certainly has little, if any, effect on their dissemination.

This brings up a very important point made by Justice Harlan in his concurring opinion in *O'Brien,* 391 U.S. at 388. He concurred in the judgment and opinion of the court, but

wanted to make clear that he expected from its impact the situation where regulation of speech-related conduct might cut off a person who wants to communicate a particular idea from a significant audience. This possibility was not present in the *O'Brien* case and is not present here. In both situations, the defendants could have communicated their ideas to any audience by many alternative means.

Appellants' argument on this point at pages 12-18 of their Jurisdictional Statement suffers from a fatal flaw. That is, they discuss flag burning as if it were pure speech and entitled to the special protection that the First Amendment gives to pure speech. However, it is clear from the *O'Brien* case that speech-related conduct is not entitled to that high degree of protection. Appellants as well as Dick Gregory have the right to verbally express their views without fear of a heckler's veto. *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969). What they do not have the right to do is to express those views by desecrating the flag.

Appellants also speak of Illinois hypothesizing in advance that hostile reaction might occur. This is absurd. No hypothesis is involved. In this case, there was proof of a hostile reaction. A motorist who happended to be passing by stopped his car, double-parked, ran to the burning flag, and extinguished the flames. It does not take much common sense to know that the feeling which provoked this reaction is widespread. The majority of people in this country love and revere the flag as a symbol of freedom and national pride and those who desecrate this symbol inevitably provoke hostile reaction. If burning the flag were the only means that Appellants had to express their opposition to government policy, it would be different, but they are free to express whatever views they want by almost any conceivable means. Regulation of flag desecration simply carves one tiny sliver from the large body of media of expression permitted.

III.

APPELLANTS' CONVICTIONS ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

A.

The Statutory Language Under Which Appellants Were Convicted Is Neutral.

Appellants claim that they were convicted under an unconstitutional statute because the Illinois Flag Desecration Statute supposedly is used only to punish dissenters. This is merely a rehash of an argument that was rejected in *O'Brien*. O'Brien claimed that Congress passed the law under which he was convicted in order to suppress protest of government policy and thereby abridge free speech. This court refused to delve into the reasons that may have motivated various members of Congress to pass the bill. There was a valid government interest in preventing the burning of draft cards that had nothing to do with suppressing dissent and there was no reason to go beyond that. Likewise, the State of Illinois has good reasons to prevent public flag burning that have nothing to do with suppression of dissent.

Both of the cases relied upon by Appellants in this connection are distinguishable for the above reason. In *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), the City of Chicago had no other reason to prohibit Mosley's picketing than its disagreement with Mosley's message. Likewise, in *Schacht* v. *United States*, 398 U.S. 58 (1970), this court held that the only reason Schacht was prosecuted was because the government disagreed with the message he intended to convey by wearing an Army uniform. It is otherwise in the present case.

B.

The Illinois Flag Act Is Not Overbroad.

In making their contention that the Illinois Flag Act is overbroad,[2] Appellants ignore *People* v. *Lindsay*, 51 Ill. 2d 399 (1972), cited elsewhere in their Jurisdictional Statement, where the Illinois Supreme Court reversed a conviction under the improper use section of the Flag Act because there was no proof of likelihood of a breach of the peace. The Illinois Appellate Court followed that holding in the present case. There is no reason to believe that the desecration section would be construed otherwise by the Illinois Supreme Court. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 109-110 (1972). Since there was evidence of likelihood of a breach of the peace here, the present case meets the requirement of *People* v. *Lindsay*. Hence, the theoretical argument made by Appellants on this point does not comport with Illinois practice. The statute is not overbroad.

C.

The Illinois Flag Act Is Not Void For Vagueness.

At pages 23 and 24 of their Jurisdictional Statement, Appellants abandon any claim that the Illinois Flag Act does not give proper notice of the conduct it seeks to prohibit, and base their argument entirely on the contention that the Flag Act is unconstitutionally vague because it permits discriminatory enforcement. It does not. Appellants make a rather diffuse and theoretical argument about the attitude of the person who is mutilating the flag by reading a requirement of motivation into the statute which is not there.

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2. See especially page 22, footnote 9, of Appellants' Jurisdictional Statement.

It is more instructive to focus upon the language under which Appellants were charged and determine whether there was any possibility of discriminatory enforcement as to them. There was not. They were not charged with having a disrespectful attitude toward the flag, nor were they charged with speaking disrespectfully of the flag. They were charged with an act (mutilation by burning) which was in itself disrespectful to the flag. There is no ambiguity here. There is no room for discriminatory enforcement. If one publicly mutilates the flag, one has committed an offense, whether one is protesting the continued presence of United States Military Forces in Viet Nam or whether one is protesting our failure to bomb the Viet Cong back to the Stone Age. Discriminatory enforcement could only come from misuse of prosecutorial discretion and not from the language of the statute. *Spence* v. *Washington*, 94 S. Ct. 2727, 2732, note 9 (dictum).

For these reasons, the statute is neither vague nor overbroad.

CONCLUSION

For the reason given above, the conviction of Appellants did not violate the Constitution and Appellees respectfully request this court to dismiss the appeal for want of a substantial federal question, or affirm the judgment of the court below, without further briefing or argument.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General for the State of Illinois
JAMES B. ZAGEL,
JAYNE A. CARR,
Assistant Attorneys General

188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Appellee.

Of Counsel.

TIMOTHY B. NEWITT,
Assistant Attorney General

DAVID DE DONCKER,
State's Attorney of Rock Island County
Rock Island County
Rock Island, Illinois 61201
(309) 786-4451